IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 265 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
HON'BLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DAHOD SAHAKARI KHARID VECHAN SANGH LTD - Applicant(s)

Versus

COMMISSIONER OF INCOME TAX - Respondent(s)

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Appearance :

MR MANISH J. SHAH FOR MR.JP SHAH for Applicant

MR MANISH R BHATT for Respondent

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CORAM :HON'BLE MR.JUSTICE D.A.MEHTA
HON'BLE MS.JUSTICE H.N.DEVANI

Date : 12/07/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1.The Income Tax Appellate Tribunal, Ahmedabad Bench "B" has referred the following two questions out of six questions proposed by the assessee – applicant under Section 256(1) of the Income Tax Act, 1961 (the Act).

> "(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in upholding the penalty under section 271(1)(c)?
>
> (2)Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that it was necessary for assessee to file cross objection inspite of fully succeeding in appeal and therefore, it cannot challenge the finding by the CIT (A) of assessee being guilty of concealment of income and / or furnishing inaccurate particulars?"

2.The assessment year is 1984-85 and the accounting period is the year commencing on 1st July 1982 and ended on 30th June 1983. The assessee, a cooperative society, filed return of income on 27-7-1984 showing total income of Rs.1,37,724/-. In course of assessment

proceedings, the Assessing Officer called upon assessee to explain why payment of insurance premium was not reflected in the accounts; this query was raised because, as recorded by the assessing officer, in earlier years, the assessee was paying such insurance premium having subscribed to Group Gratuity Insurance Scheme for the employees of the assessee society. The assessee's explanation was that, considering the amount of premium which the assessee was required to pay and the corresponding benefit, it was found by the assessee that the Scheme was not beneficial to the assessee and therefore, the assessee withdrew from the Scheme and payment of premium was discontinued. That on such discontinuance and withdrawal from the Scheme, an amount of Rs.68,332/- was received from the Insurance Company, being the total premium paid in earlier years.

3. The assessing officer, therefore, held that the amount of premium paid in earlier years was treated and allowed as a trading liability and subsequent receipt of Rs.68,332/- was liable to be treated as profits under Section 41(1) of the Act; and as the assessee had failed to return the said amount as income called upon the assessee to explain, why the same should

not be brought to tax. The assessee explained that the sum received from Insurance Company was credited to the gratuity fund account which was going to be utilized for the purpose of paying gratuity. The assessee's explanation was rejected and the amount brought to tax under Section 41(1) of the Act. While doing so, the assessing officer also took note of the fact that a sum of Rs.55,796/- was paid as bonus and gratuity to the employees and deduction thereof claimed on actual payment basis. The assessing officer has further observed that the assessee could not be allowed benefit on due basis. The assessing officer also issued direction to issue penalty notice under Section 274 read with section 271(1)(c) of the Act for inaccurate particulars of income.

4. The assessee challenged the addition of Rs.68,332/- before Commissioner (Appeals) along with the other items of disallowances and additions. However, before the Commissioner (Appeals), it was pointed out that the appeal had only been preferred to safeguard the assessee's interest as regards levy of penalty for concealment. It was submitted that, as the amount received from the Insurance Company had been taken to balance sheet directly, it had

remained to be considered as taxable income of the assessee while filing return of income. That there was no malafide intention on part of the assessee in excluding the amount as no single individual was personally going to be benefited by such an exercise. The representative of the assessee admitted before the Commissioner (Appeals) that the assessee was agreeable to the addition provided no concealment penalty was levied. The Commissioner (Appeals) dismissed the appeal by order dated 31-10-1988.

5. In the meantime, the assessing officer issued notice dated 11-12-1986 calling upon the assessee to show cause why penalty should not be imposed. The assessee replied on 24-12-1986 and it was stated that the amount received from the Insurance Company had been taken to reserve fund and there was no mens rea or malafide intention. That the amount was mistakenly not added while computing income; the assessee being a cooperative society, it could not have malafide intention of “defrauding government revenue”. It was further submitted that the tax due had been paid up with interest and hence, a request was made to drop the penalty proceedings.

6.The assessing officer, after recording the submissions made in the reply to the show cause notice, observed in the penalty order that the contentions raised by the assessee were not acceptable “inasmuch as the assessee has virtually not advanced any reason in respect of addition made under Section 41(1)”. In paragraph No.5 of the penalty order, the same observations which were made in the assessment order have been reiterated. While doing so, the assessing officer has observed, “the assessee cannot now also claim this sum of Rs.68,332/- as a deduction on due basis.”. He, therefore, after rejecting the explanation tendered by the assessee, levied a penalty of Rs.30,770/- vide order dated 10-3-1987.

7.The assessee carried the matter in appeal before the Commissioner (Appeals) who cancelled the penalty and observed as under while doing so :

> “I have considered the submissions. In this case, practically it cannot be denied that the assessee had concealed the particulars of his income furnished inaccurate particulars of his income for the year under consideration, however, I would agree with the representative of the assessee to hold that this is not a fit case for levy of penalty for

concealment as no individual member of the cooperative society would be personally interested in knowingly concealing the income or furnishing inaccurate particulars. The relevant portion of section 271(1)(c) is reproduced to highlight the view that it is not necessarily in all cases of concealment where an assessee has concealed the particulars of his income, the penalty under this section is leviable, the section reads" "If the (Assessing) Officer or the (Dy. Commissioner (Appeals) or the Commissioner (Appeals), to the course of any proceedings under this Act, is satisfied that any person – has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty ..." To my mind, if the intention of the legislature was to penalize every case where concealment of particulars of income have been noted by the Assessing Officer, the word used would have been "he shall direct that such person shall pay by way of penalty ... rather than the usage of the word he may direct. Keeping in view the nature of business of the registered co-operative society and the circumstances which lead to the inclusion of this income in the total income of the year under consideration, I would consider that this is not a fit case where the assessee should be directed to pay the concealment penalty. On facts and circumstances, the Income tax Officer is directed to delete the penalty levied u/s 271(1)(c) of Rs.30,770/-."

8.Revenue carried the matter in appeal before the Tribunal and the following ground was raised before the Tribunal :

> ”On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in deleting the penalty levied u/s 271(1)(c) of the I.T. Act?”

9.During course of hearing, on behalf of revenue, a contention was raised that Commissioner (Appeals) had contravened provisions of Rule 46A of the Income Tax Rules, 1962 (the Rules) and was unnecessarily influenced by new evidence in the form of affidavit placed before Commissioner (Appeals). That no notice of the same was given to the assessing officer and as the Department was not represented before Commissioner (Appeals), it had resulted in prejudice to the Department. Further submissions were made on behalf of appellant regarding merits of the addition in question.

10.The Tribunal, after recording submissions made on behalf of the assessee, allowed the departmental appeal and while doing so, observed as under :

> “On consideration of the rival submissions and the material to which our attention was drawn, we find the CIT (A) has wrongly cancelled the penalty. The assessing officer had found as a matter of fact that the explanation offered during the assessment proceedings that the receipt was credited to gratuity fund account to be utilized for the payment of gratuity was incorrect since the assessee itself had made separate claim in the profit and loss account for deduction of gratuity on the basis of actual payment. This finding given by the assessing officer remains uncontroverted and therefore, clearly the penalty is exigible. In fact, the CIT (A) has also given a categorical finding that the assessee was guilty of concealing the particulars of income and / or furnishing inaccurate particulars of income. This finding also remains unchallenged since the assessee has not filed cross objection.”

10.1 The Tribunal further observed that the explanation before Commissioner (Appeals) and the Assessing Officer was altogether different. That the contention raised on basis of violation of Rule 46A of the Rules was acceptable and the affidavit which had been admitted in evidence by Commissioner (Appeals) had to be ignored in view of violation of principle of natural justice embodied in Rule 46A of the Rules. Therefore, Commissioner

(Appeals) was in error in granting relief on the basis of the said affidavit.

10.2The Tribunal, thus, did not take into consideration the affidavit of General Manager filed by the assessee before Commissioner (Appeals), and on the other hand, accepted the other finding recorded by Commissioner (Appeals) to hold against the assessee and allow the departmental appeal. It is this order which is under challenge.

11.Mr.Manish Shah, learned counsel appearing on behalf of the applicant – assessee, submitted that Tribunal had committed an error in coming to the conclusion that explanation tendered by the assessee before the assessing officer and the Commissioner (Appeals) was different. In fact, the assessee had offered only one explanation, and that was, that the assessee had no malafide intention or mens rea in not showing the sum received from Insurance Company in the return of income. That the affidavit of the General Manager which was filed before Commissioner (Appeals) was only elaborating on this basic defence. Therefore, even if the said affidavit was ignored, no case was made out for levying penalty. Referring to the

reply filed by the assessee in response to the show cause notice in penalty proceedings, it was submitted that the assessee society consistently stated that it being a cooperative society, it could not have any malafide intention. The Tribunal had omitted to appreciate this submission. That merely because the assessee had agreed to addition or accepted the addition made under section 41(1) of the Act, from that it did not follow that the assessee was liable to be visited with penalty. He has placed reliance on the following decisions:

(1)In K.C.Builders v. Assistant Commissioner of Income Tax, [2004] 265 ITR 562,

(2)National Textiles v. Commissioner of Income Tax, [2001] 249 ITR 125,

(3)Commissioner of Income Tax v. Susai Kalyanamandapam Pvt. Ltd., [2004] 271 ITR 138.

12.In relation to the observation of the Tribunal that the finding of CIT (A) to the effect that the assessee was guilty of concealing particulars of income and / or furnishing inaccurate particulars of income remained

unchallenged in absence of any cross objection filed by the assessee, Mr.Shah submitted that the Tribunal has failed to take into consideration Rule 27 of the Income Tax (Appellate Tribunal) Rules, 1963 (the Tribunal Rules). That as per Rule 27 of the Tribunal rules, a respondent is entitled to support the order appealed against on any of the grounds decided against the respondent, even though the respondent may not have appealed against such an order. He, therefore, urged that the assessee was entitled to support the order of Commissioner (Appeals) by challenging the aforesaid finding.

13.Alternatively, it was submitted that, if on facts, it was necessary to consider the affidavit of the General Manager, the Tribunal ought to have remanded the matter back to Commissioner (Appeals) for giving an opportunity to the assessing officer. The Tribunal could not have ignored the said evidence altogether. That even Rule 46A required granting of an opportunity to the assessing officer. He, therefore, urged that, as per proposed question No.4, the assessee had specifically challenged: as to whether the Tribunal ought to have given opportunity to the assessing officer under Rule 46A of the Rules

before admitting the affidavit of the General Manager of the assessee. That in paragraph No.7 of the Statement of Case, the Tribunal itself having observed that the said proposed question was merely a different facet of question No.1 and the same may be regarded as covered in question No.1, this Court ought to answer the said question by directing the Tribunal to restore the matter to the file of Commissioner (Appeals). But in no case, the penalty should be confirmed merely because the Commissioner (Appeals) had committed a technical lapse.

14. It is necessary to record that the reference was called out on 11th July 2005 and is being heard since yesterday. That after the reference had proceeded for about 2.1/2 hours even today, Mr.K.M.Parikh, the learned standing counsel for revenue appeared and prayed for time after completion of the submissions on behalf of applicant assessee. The Court has not found it fit to grant the request considering the fact that the matter is being heard since yesterday. On being called upon to address the Court, the learned counsel expressed his inability in absence of the necessary paper-book as well as preparation for the same. After the judgement was half-way

through, the learned counsel requested the Court that he was ready to proceed with his arguments. The right to address the Court is not unfettered and cannot be permitted to be exercised at the sweet-will and convenience of an advocate. The Court has a right – NAY, a duty to regulate its proceedings and the Court cannot function so as to cause inconvenience to other advocates to accommodate one advocate. The Court has not permitted the learned counsel in these circumstances.

15. Taking up the second issue first. The Tribunal has committed an error in law in holding that the assessee having not filed cross objection against findings adverse to the assessee in the order of Commissioner (Appeals), the said findings had become final and remained unchallenged. The Tribunal apparently lost sight of the fact that the assessee had succeeded before the Commissioner (Appeals). The appeal had been allowed and the penalty levied by the assessing officer deleted in entirety. In fact, there was no occasion for the assessee to feel aggrieved and hence, it was not necessary for the assessee to prefer an appeal. The position in law is well settled that a cross objection, for all intents and purposes, would amount to an appeal and the

cross objector would have the same rights which an appellant has before before the Tribunal.

16.Section 253 of the Act provides for appeal to the Tribunal. Under sub-section (1), an assessee is granted right to file an appeal; under sub-section (2), the Commissioner is granted a right to file appeal by issuing necessary direction to the assessing officer; sub-section (3) prescribes the period of limitation within which an appeal could be preferred. Section 253(4) of the Act lays down that either the assessing officer or the assessee, on receipt of notice that an appeal against the order of Commissioner (Appeals) has been preferred under sub-section (1) or sub-section (2) by the other party, may, notwithstanding that no appeal had been filed against such an order or any part thereof, within 30 days of the notice, file a memorandum of cross objections verified in the prescribed manner and such memorandum shall be disposed of by the Tribunal as if it were an appeal presented within the period of limitation prescribed under sub-section (3). Therefore, on a plain reading of the provision, it transpires that a party has been granted an option or a discretion to file cross objection.

17.In case a party having succeeded before Commissioner (Appeals) opts not to file cross objection even when an appeal has been preferred by the other party, from that it is not possible to infer that the said party has accepted the order or the part thereof which was against the respondent. The Tribunal has, in the present case, unfortunately drawn such an inference which is not supported by the plain language employed by the provision.

18.If the inference drawn by the Tribunal is accepted as a correct proposition, it would render Rule 27 of the Tribunal Rules redundant and nugatory. It is not possible to interpret the provision in such manner. Any interpretation placed on a provision has to be in harmony with the other provisions under the Act or the connected Rules and an interpretation which makes other connected provisions otiose has to be to avoided. Rule 27 of the Tribunal Rules is clear and unambiguous. The right granted to the respondent by the said Rule cannot be taken away by the Tribunal by referring to provisions of Section 253(4) of the Act. The Tribunal was, therefore, in error in holding that the finding recorded by the Commissioner (Appeals) remained unchallenged since the assessee had

not filed cross objections.

19. Accordingly, the second question (proposed question No.3) is answered in the negative i.e. in favour of the assessee and against the revenue.

20. Coming to the principal issue as to whether the assessee was liable to penalty under Section 271(1)(c) of the Act. In the facts and circumstances of the case, it is necessary to take note of certain undisputed facts. The assessee had passed necessary entries in its books of account as regards the sum received from the Insurance Company, and the same was duly reflected in the balance sheet. Copy of staff gratuity fund account is available on record (Annexure “J”). The sum having been received from the Insurance Company was through normal banking channel and hence, there is no situation where any suspicion can arise qua genuineness of the transaction. The only ground on which the addition has been made and sustained is applicability of section 41(1) of the Act.

21. The said provision, namely Section 41(1) of the Act requires that where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or

trading liability incurred by the assessee, and subsequently during any previous year, the assessee has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation, the amount obtained or the value of benefit accruing, shall be deemed to be profits and gains of business or profession and accordingly, chargeable to income tax as the income of that previous year. In the present case, the premium paid to the Insurance Company towards gratuity liability was allowed as a deduction from year to year in past assessments of the assessee. During the accounting year relevant to the assessment year in question, the assessee received a sum of Rs.68,332/- from the Insurance Company on withdrawing from Group Insurance Scheme. Therefore, in past, there was expenditure incurred by the assessee which was allowed as a deduction, and subsequently, the assessee has obtained an amount in cash in respect of such expenditure; thus, the amount obtained is to be deemed to be profits and gains of the business of the assessee. Therefore, the receipt from the Insurance Company has been brought to tax under a deeming

provision.

22.The assessee has all throughout contended that, instead of routing the said receipt through profit and loss account, the same was directly credited to gratuity fund account and because of this bonafide mistake, while preparing the return of income, the amount received from the Insurance Company was not included in the total income. This explanation tendered by the assessee has not been found to be incorrect or false in any manner whatsoever. In these circumstances, the question requires to be resolved.

23.The legal position as enunciated by this Court and by the Apex Court is as under :

23.1 In the case of National Textiles v. Commissioner of Income Tax, (2001) 249 ITR 125, this Court stated, “In order to justify the levy of penalty, two factors must co-exist, (i) there must be some material or circumstances leading to the reasonable conclusion that the amount does represent the assessee's income. It is not enough for the purpose of penalty that the amount has been assessed as income and (ii) the circumstances must show that there was animus, i.e.,

conscious concealment or act of furnishing of inaccurate particulars on the part of the assessee. The Explanation has no bearing on factor No.1 but it has a bearing only on factor No.2. The Explanation does not make the assessment order conclusive evidence that the amount assessed was in fact the income of the assessee. No penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. If the assessee gives an explanation which is unproved but not disproved, i.e. it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false, the Explanation cannot help the Department because there will be no material to show that the amount in question as the income of the assessee.

Alternatively treating the Explanation as dealing with both the ingredients (i) and (ii) above, where the circumstances do not lead to the reasonable and positive inference that the assessee's explanation is false, the assessee must be held to have proved that there was no

mens rea or guilty mind on his part. Even in this view of the matter, the Explanation alone cannot justify levy of penalty. Absence of proof acceptable to the Department cannot be equated with fraud or willful default."

23.2 In the case of K.C.Builders v. Assistant Commissioner of Income Tax, (2004) 265 ITR 562, the Apex Court stated, "One of the amendments made to the above mentioned provisions is the omission of the word "deliberately" from the expression "deliberately furnished inaccurate particulars of such income". It is implicit in the word "concealed" that there has been a deliberate act on the part of the assessee. The meaning of the word "concealment" as found in Shorter Oxford English Dictionary, third edition, Volume I, is as follows:

> "In law, the intentional suppression of truth or fact known, to the injury or prejudice of another."
>
> The word "concealment" inherently carried with it the element of mens rea. Therefore, the mere fact that some figure or some particulars have been disclosed by itself, even if it takes out the case from the purview of non-disclosure, it cannot by itself take out the case from the purview of furnishing inaccurate particulars. Mere omission from the return of an

> item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon. In order that a penalty under Section 271(1)(iii) may be imposed, it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of his income."

24. Applying the aforesaid principles to the facts of the case, it is apparent that the assessee's contention that it had no malafide intention or mens rea has not been found to be untrue by any of the authorities. The finding by the Tribunal in this context that the assessee had made separate claim in the profit and loss account for deduction of gratuity on the basis of actual payment to non-suit the assessee as regards the explanation offered is based on a misconception of facts and law. It was never the assessee's case that, out of the amount received from the Insurance Company, such amount was actually paid out and claimed as a deduction. In fact, this becomes clear when one reads the assessment order and the penalty order wherein the assessing officer has stated

that the assessee cannot claim the sum of Rs.68,332/- as a deduction on due basis. The assessee has never claimed any deduction qua this amount. The deduction claimed is qua a separate amount, and that too, on actual payment basis. There is no claim for deduction on due basis. The entire premise, therefore, is incorrect.

25. Once there is absence of mens rea, mere omission from the return of income of an item of receipt neither amounts to concealment, nor deliberate furnishing of inaccurate particulars of income, as laid down by the Apex Court, unless and until there is some evidence or some circumstances to show that the omission was attributable to an intention or desire on part of the assessee to conceal the income so as to avoid imposition of tax thereon. In the present case, the assessee is a cooperative society managed through a governing board and as stated by the society, there is no personal interest involved. The omission has occurred not with an intention but due to oversight. As held by this Court, absence of proof acceptable to the department cannot be equated with fraud or willful default. The circumstances must show that there was a conscious act of concealment or furnishing of inaccurate

particulars on part of the assessee. There is nothing on record to show that any particular individual has any personal interest in committing the act of omission of showing the amount received from Insurance Company as income of the assessee, a cooperative society. In fact, the entries in the books of account reflect that the assessee had credited the said sum to the fund account directly and the said entry appeared in the balance sheet without going through the profit and loss account.

26. Therefore, the finding recorded by the Tribunal that penalty was exigible is not correct in the facts and circumstances of the case as well as in light of the settled legal position. The Tribunal has while partially upholding the observations of Commissioner (Appeals), failed to take into consideration the finding recorded to the effect that this was not a fit case for levy of penalty for concealment as no individual member of the cooperative society would be personally interested in knowingly concealing the income or furnishing inaccurate particulars.

27. The question No.1, therefore, requires to be answered in the negative i.e. in favour of the assessee and against the revenue.

28.The Reference stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[H.N.DEVANI, J.]

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